ME COURT ...

Supreme Court, U.S.
FILED
MAY 15 1969
JOHN F. DAVIS, CLERK

No. 1260.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

PEPPERELL MANUFACTURING COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

REPLY BRIEF FOR PETITIONER.

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ST. LOUIS LAW PRINTING CO., INC., 411-15 N. Eighth St., 63101. CEntral 1-4477.

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INTRODUCTION.

Pepperell Manufacturing Company (referred to herein as the Petitioner) has petitioned for a writ of certiorari to review the Decision of the United States Court of Appeals for the Fifth Circuit in this matter. The National Labor Relations Board (referred to herein as the Respondent) has filed its Brief in Opposition to the Petitioner's Petition. The Brief in Opposition raises an argument for the first time, to which this Reply Brief is addressed pursuant to Rule 24 (3).

STATEMENT.

The Record does not support arguments contained in Respondent's Brief which seek to justify the failure to afford Petitioner a Hearing on its Objections to a Representation Election.

At Page 6, Footnote 4 of Respondent's Opposition Brief, it is for the first time asserted by the Board's appellate Counsel that the issue of the Company's ability to make timely replies to the Union's misrepresentations was a matter of **undisputed** fact.[1] The disputed fact issues, which have been ignored throughout the proceedings below, included the very issues which the Board's appellate counsel now asserts were not disputed.

Whether or not the Company had ample opportunity to reply to wage misrepresentations is a disputed issue of fact. The Board had no factual evidence before it upon which to conclude that the Company "did not make a concerted effort to obtain the facts" or that the facts were "readily available", and the **only** evidence before the Board was (1) the Company **did not know** that the wage representations (made by a Union which was a part of the Union Trade Council whose members negotiated the wages) were **in fact misrepresentations** until **after** the election, and (2) that despite prompt and diligent efforts to

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[1] "Petitioner's contention that there was a controversy over its ability to make timely reply to the union's wage representation (Pet. 5) is really a quarrel with the conclusion which the Board drew from **the undisputed facts in the record.** Thus, the Board held that four days were sufficient for the company to ascertain the facts, where, as here, they were not within the peculiar knowledge of the union (*supra*, pp. 4-5). The company's affidavit does not controvert this conclusion; it merely discloses that **the company did not make a concerted effort to obtain the facts** until the leaflet reappeared on the day before the election and that **they were readily available when that effort was made** (R. 154, 171-175)." (Emphasis added.) Opposition Brief, Page 6, Footnote 4.

determine the **true** facts when the wage misrepresentations became a key issue in the Union election, it was unable to gain meaningful evidence of the falsity of the representations until **after** the vote had been conducted. Contrary to the Board's footnote assertion, the true facts were not "readily available".[2]

The Board has not held that "four days were sufficient for the Company to ascertain the facts" and the Board has not held that the information was "readily available". The Board, in an *ex parte* election proceeding, simply held, without explanation, that there ". . . was ample time for an employer reply before the election . . ." and that the wage information was not such as fell within the special knowledge of the Union. In seeking a hearing on the unfair labor practice charges following the Board's erroneous ruling in the election proceeding, the Company contradicted by affidavit the Board's *ex parte* election findings. The Board did not challenge the evidence submitting including (1) that the Company ". . . did not know that the wage and fringe benefit representations in the advertisement were false (Tr. 152), and (2) the evidence that the Company was not able to obtain the information concerning the truth or falsity of these representations

[2] The Board's references to the Record to support the assertion that the information was readily available pertain to an affidavit made on August 24, following the election on August 4, which affidavit recites evidence of the Union's misrepresentations to the extent they were then available; but, even at this time, some three weeks following the election, at least two of the companies contacted had been unable to calculate the average hourly pay information which the Company was requesting in support of its objections to the election (Tr. 174-175). The Record shows that the only successful effort that the Company was able to make **prior** to the election in securing information to which the Board refers (Tr. 154), revealed that the wage and fringe benefit representations were correct, unlike the misrepresentations which were subsequently discovered. The only inaccurate information discovered **prior** to the election concerned sponsorship and this was publicized to at least some of the voters within the remaining time prior to the election.

until after the election . . . ." (Tr. 154). The Board has never ruled that the information was readily available. In response to Counsel's assertion to the contrary, the affidavit offered in opposition to summary judgment dated April 21, 1967, more than eight months after the election, states:

> "I would like to add that some of the companies whose wages and fringe benefits were represented in the advertisement and leaflet **have still not furnished us the information upon which we could determine the truth or falsity of such representations despite my continued attempts to obtain this information, both before and after the election**" (Tr. 155). (Emphasis added.)

This same affidavit which was submitted in opposition to summary judgment and seeking a hearing is replete with statements and allusions which firmly contradict the inference that the information was "readily available".[3]

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[3] See, *e. g.*:

". . . When I attempted to obtain information from management people connected with these various companies, I, of course, quickly discovered that they were reluctant to inject their companies in our labor dispute . . . ." (Tr. 153).

". . . my contacts with people at these plants before and immediately after the election met with the response that the information I sought to verify contained in the advertisement and leaflet was not immediately available and that they would call me back. In some instances, I was told that the person I was talking with did not have the authority to give me this information and I was referred to other people. However, despite my efforts during this period of time and particularly after the impact of the leaflet distribution on the afternoon of August 3, I was not able to obtain the information concerning the truth or falsity of these representations until after the election with the exception of the representations made concerning Carolina Freight Carriers . . ." (Tr. 154).

"Due to the large number of misrepresentations and distortions of truth and misstatements, as well as half truths, in rumors that were being circulated in our plant, as well

SUMMARY.

The Board's failure to provide a hearing has led its appellate Counsel to engage in "post hoc rationalizations for agency action . . ." which this Court has consistently ruled are unacceptable if the integrity of the administrative process is to be preserved. **Burlington Truck Lines v. United States,** 371 U. S. 156 at 168. This Court has long made it clear that when the Board exercises discretion given to it by Congress it must "disclose the basis of its order" in order that its action can properly be reviewed. **Phelps Dodge Corporation v. Labor Board,** 317 U. S. 177, at 197. We submit that the Board may not, either through the denial of an administrative hearing or the failure to articulate its reasons for decision and thus ignore crucial issues of fact, escape the mandate of this Court expressed in **NLRB v. Metropolitan Insurance Company,** 380 U. S. 438:

> "For reviewing courts to substitute counsel's rationale or their discretion for that of the Board is incompatible with the orderly function of the process of judicial review. Such action would not vindicate, but would deprecate the administrative process or it would 'propel the Court into the domain which Congress has set aside exclusively for the administrative agency'. **Securities & Exchange Commission v. Chenery Corp.,** *supra*, 332 U. S. at 196, 91 L. Ed. at 1999."
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> *supra*, at 444.

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as leaflets being distributed by the Union, it was a physical impossibility for me or the Company to check the accuracy of all of these misrepresentations . . ." (Tr. 156).

". . . It would also have been a physical impossibility for us to have even attempted to answer the many and varied misrepresentations and false statements above referred to . . ." (Tr. 157).

". . . there was no time in which to answer these false and deliberate untruths made by the Union" (Tr. 157).

Consistent with Metropolitan, it is submitted that this Court should grant certiorari and vacate the judgment of the Court of Appeals, with a remand of the matter to that Court with a direction to return the matter to the Board for a hearing on the disputed factual issues.

Respectfully submitted,

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